United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-6117

No. 76-6117

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., MISERICORDIA HOSPITAL MEDICAL CENTER and BUFFALO GENERAL HOSPITAL, THE GENESEE HOSPITAL, and THE MOUNT SINAI HOSPITAL on behalf of themselves and all other nonprofit hospitals which are members of the HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., and which are reimbursed for Medicaid Services rendered to hospital patients,

Plaintiffs-Appellees,

v.

PHILIP L. TOIA, as Commissioner of Social Services of the State of New York, ROBERT P. WHALEN, as Commissioner of Health of the State of New York, PETER GOLDMARK, as Director of the Budget of the State of New York, HUGH L. CAREY, as Governor of the State of New York,

Defendants-Appellants.

and

DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendant.

APPEAL FROM THE JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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December 30, 1976

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BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

Defendants-appellants challenge Orders entered by Judge Morris E. Lasker of the United States District Court for the Southern District of New York on August 2 and November 9, 1976. The Orders are not reported.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court had jurisdiction to impose retroactive payment obligations on the State of New York commencing January 1, 1976, in view of the fact that such relief

is foreclosed by the Eleventh Amendment of the Constitution, that the federal statute requiring states to waive Eleventh Amendment immunity was recently repealed by Congress retroactive to January 1, 1976, and that the Department of Health, Education and Welfare has approved the amendment of the State's Medicaid plan withdrawing its consent to suit effective January 1, 1976.

2. Whether the District Court has general equity jurisdiction to require retroactive payments by a state in view of the cooperative federalism scheme prescribed by the Social Security Act and in the absence of any provision in the Act contemplating such relief.

REFERENCES TO PARTIES AND RULINGS

The parties in this case are various officials of the State of New York, the defendant-appellants in this proceeding; the Secretary of HEW, a named defendant; and various hospitals and associations of hospitals, plaintiffs-appellees in this case. By Orders of August 2 and November 9, 1976, District Judge Lasker ordered the State defendants to recompute rates for in-patient medical services provided by plaintiffs pursuant to the federal Medicaid program beginning January 1, 1976, and to reimburse plaintiffs at those generally higher rates until HEW approval of the rate methodology initially utilized by the State. The two Orders are set forth in the Joint Appendix.

STATEMENT OF THE CASE

A. Background

Under the Medicaid program, Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., providers of medical services are reimbursed by local, state and federal governments for services rendered to eligible patients. The states administer the program pursuant to the statute and to regulations promulgated by DHEW. Federal law requires that certain aspects of a state's Medicaid program be embodied in its "State Plan," which must be approved by DHEW.

Since January 1, 1970, New York State has reimbursed hospitals for in-patient services at rates calculated according to a prospective reimbursement methodology. This methodology is part of the State Plan approved by DHEW and is based upon predicted costs rather than a retrospective formula. In 1975, the State, facing substantially increased Medicaid costs and a major financial crisis, decided that it was imperative that it re-evaluate its initial in-patient reimbursement formula. Accordingly, it embarked on a study that led to the promulgation, on July 1, 1976, of a revised formula lowering the ceiling on routine in-patient costs and imposing, for the first time, a ceiling on so-called ancillary in-patient costs. */

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*/ The State also took certain steps concerning out-patient costs that are the subject of ongoing proceedings in the District Court, but which are not at issue in the present appeal.

These new regulations, 10 N.Y.C.R.R. §§ 86.14(b), 86.21(k) and 86.26, were submitted to DHEW for its review. On August 16, 1976, DHEW approved Sections 86.14(b) and 86.21(k). It subsequently approved Section 86.26.

The State publishes Medicaid reimbursement rates on an annual basis. Because it was unable to publish its 1976 reimbursement methodology by January 1, 1976, the State published interim reimbursement rates pursuant to which it reimbursed hospitals for in-patient services from January 1, 1976, until it was able to publish its new regulations on July 1, 1976. After July 1, 1976, the State recalculated reimbursement rates for the period January 1, 1976, to July 1, 1976, using its new reimbursement formula.

B. The Proceedings Below

On May 5, 1976, HANYS and other named plaintiffs filed suit seeking declaratory and injunctive relief from the interim rates then in effect for in-patient and out-patient hospital services. Following the State's publication of its new in-patient reimbursement formula on July 1, 1976, plaintiffs amended their Complaint to challenge the new reimbursement methodology, and plaintiffs moved for a preliminary injunction against the in-patient hospital reimbursement methodology. Following briefs and argument, Judge Lasker granted plaintiffs' motion. In his Order entered August 2, 1976, Judge Lasker issued a declaratory

judgment that 10 N.Y.C.R.R. §§ 86.14(b), 86.21(k) and 86.26 were unlawful until approved by DHEW and permanently enjoined their application to plaintiffs until DHEW approved them. Judge Lasker further directed the State to recalculate the in-patient reimbursement rates pursuant to the pre-existing DHEW-approved formula for the period beginning January 1, 1976, and to continue the recalculated rates in effect until such time as DHEW approved the new formula. In those cases in which the recalculated rates proved higher than the enjoined rates, Judge Lasker ordered the State to make retroactive payments to the affected hospitals. He rejected defendants' argument that this retroactive relief was barred by the Eleventh Amendment, on the ground that Congress had required states participating in the Medicaid program to waive their Eleventh Amendment immunity. That legislation was subsequently repealed retroactive to its effective date.

The State immediately appealed Judge Lasker's August 2, 1976 Order and this Court held an initial hearing of the appeal on August 17, 1976.*/ At the hearing, counsel for the State apprised the Court of DHEW's approval, on August 16, 1976, of the principal regulations in issue, 10 N.Y.C.R.R. §§ 86.14(b) and 86.21(k). This Court suggested that the issue of retroactive effect of DHEW approval be submitted to Judge Lasker for an initial determination. On November 9, Judge Lasker ruled that DHEW approval had prospective effect only, and that ruling is also now before this Court.

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*/ The appeal of the August 2, 1976 Order is Dkt. No. 76-6117.

SUMMARY OF ARGUMENT

The District Judge was without jurisdiction to order the State to make payments to hospitals for past periods on a basis other than that utilized by the State. This is so for two reasons:

First, that relief violates the State's immunity under the Eleventh Amendment of the Constitution, since it would impose a retroactive financial obligation upon the State. The Supreme Court's recent decision in Edelman v. Jordan, 415 U.S. 651 (1974), expressly precludes imposition of any such obligation against the states. The decision of the District Judge to the contrary was based entirely upon federal legislation passed on December 31, 1975, in which Congress had required the states to consent to suits by providers of in-patient hospital services as a condition to securing the full benefits of federal assistance. However, on October 18, 1976, Congress repealed this statute, retroactive to its specified effective date, having determined that the consent-to-suit legislation was ill-advised and possibly unconstitutional as well. Subsequently, DHEW directed the states to amend their state Medicaid plans, effective January 1, 1976, to remove the consent-to-suit provision required by the 1975 legislation. The State of New York has done so, and DHEW has approved that amendment effective January 1, 1976. The new statute, and DHEW and state action comporting with it, therefore remove the subject

matter jurisdiction basis initially invoked by the Court, and the Court's Orders requiring retroactive money payments to the plaintiffs therefore must be vacated.

Second, the Orders of the District Court are diametrically inconsistent with this Court's decision in Rothstein v. Wyman, 467 F.2d 226 (1972). That case holds that a federal court does not have general equity jurisdiction to compel payments under the Social Security Act for past periods in view of the "significant increase in federal-state tensions which would result from a court order requiring the state to expend its funds against its will" (at 235). It follows a fortiori from the Rothstein decision that the Court's Order for retroactive payments must be vacated here.

ARGUMENT

The State defendants will show that there are two independently dispositive jurisdictional bars to the District Judge's Order requiring retroactive payment of funds by the State to plaintiff hospitals. Because these threshold jurisdictional points are clear-cut and compel reversal of the decision below, the State defendants will not address in this brief their nonjurisdictional challenges to the decision of the District Judge. The State does believe, however, that there are serious questions as to the validity of the District Judge's disposition of this case apart from these jurisdictional questions.

For the District Judge has entered a sweeping decision, the effect of which is that no state can ever make payments to hospitals under a payment methodology or revisions thereof, until after it has obtained DHEW approval of the methodology. It does not matter, according to the decision of the District Judge, that a state faces a severe fiscal crisis which requires immediate action; or that DHEW substantially delays its process of approval; or that DHEW ultimately determines that the rates are reasonable and satisfy all federal standards. Instead, the District Judge concluded that prior DHEW approval is an inflexible and mandatory condition precedent to the implementation of hospital rates and that no rates can be implemented until that approval has been afforded and, even then, only prospectively. Given the enormous amount of state funds committed to the Medicaid program and the inequities inherent in this rigid approach, the result could be supported only if the governing legislation compelled it -- which it does not. But in this case there is no need to reach these difficult and fundamental questions because the law is so clear that the federal courts are without jurisdiction to order retroactive payments to hospitals for in-patient care, which is the subject of the orders on appeal.

I. THE ELEVENTH AMENDMENT OF THE CONSTITUTION PRECLUDES RETROACTIVE RELIEF AGAINST THE STATE DEFENDANTS.

The Eleventh Amendment of the Constitution affords immunity from suit to the State of New York and its officials.

The District Court for the Southern District of New York, in entering the Order of August 2, 1976 on appeal here, predicated jurisdiction in this action on an assumed waiver of that immunity based on a federal statute requiring the State to consent to suit in cases involving in-patient hospital rates. However, subsequent to the Court's Order, that statute was repealed by Congress retroactive to its effective date of January 1, 1976, for the purpose of eliminating such coerced waivers.*/ As a result, all retroactive relief against the State defendants, including that already granted (as well as all prospective relief other than that based on alleged violation of the Federal Constitution) is barred by the Eleventh Amendment and beyond the power of a federal court to grant.

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*/ It is clear that this Court has both the authority and the obligation to consider the jurisdictional issue. The Supreme Court has established that the Eleventh Amendment partakes of the nature of a jurisdictional bar, and "sets forth an explicit limitation on federal judicial powers of such compelling force," that it may be raised at any stage of the judicial proceedings. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466-67 (1945); Edelman v. Jordan, 415 U.S. 651 (1974). However, since the statute on which the District Court based jurisdiction was retroactively repealed subsequent to that Court's decision, the State defendants have filed with that Court a motion to dismiss for lack of subject matter jurisdiction, scheduled to be heard on January 6, 1977, in order that the District Court may have an opportunity to reconsider the jurisdictional issue in light of the new statutory development.

A. The State's Statutory "Waiver" of Eleventh Amendment Immunity Does Not Survive the Retroactive Repeal of the Federal Statute Requiring Consent to Suit.

In the District Court, plaintiffs in this action sought monetary relief retroactive to January 1, 1976, based on allegedly improper reliance by the State on its regulations dealing with reimbursement rates for hospital services under the Medicaid program. The District Court determined in its Oral Opinion of July 29, 1976, that jurisdiction was properly established in this action, and that defendants were not entitled to assert their Eleventh Amendment immunity. The Court based this determination on its belief that Public Law 94-182, Section 111(a), December 31, 1975, amending 42 U.S.C. § 1396, evidenced the Congressional intention to require the states to consent to suits involving in-patient hospital rates in order to secure the full benefits of federal assistance. (Oral Opinion of Judge Lasker, July 29, 1976, 76 Civ. 2027, p. 15.)

Congress subsequently determined that forcing states to give up their fundamental constitutional right of immunity was not only ill-advised, but possibly unconstitutional as well, and on October 18, 1976 repealed Section 111(a) effective as of January 1, 1976, the day it took effect. Pursuant to the retroactive repeal of the statute, and in compliance with an HEW directive of October 28, 1976 to the states, New York removed from its State Plan, effective as of January 1, 1976, the waiver provision it had previously been required to include.

The retroactive repeal of Section 111(a) makes it clear that Congress has not, for any part of the period in question, deprived the State of its Eleventh Amendment immunity, and thus that there is no subject matter jurisdiction in the federal courts to award the relief granted by the Court below.*/ As the District Court recognized in its Oral Opinion of July 29, 1976, under the Supreme Court decision in Employees v. Missouri Public Health Department, 411 U.S. 279 (1973), the factor determinative of whether or not a state can be sued is whether Congress, in enacting the particular federal statute in question, intended that it could be sued. The legislative history of Public Law 94-552 leaves no doubt as to the reason for Congress' hasty and ill-advised enactment of Section 111, or that in retroactively repealing it Congress intended to insure that the states would suffer no ill effects from either compliance or noncompliance with the provision. The Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1122, 94th Cong., 2d Sess., May 11, 1976, makes clear that Congressional action in enacting Section 111 was prompted by concern that providers of in-patient hospital services whose reimbursement levels were lowered by a state were without a remedy in federal courts,

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*/ The Order on appeal was predicated on the State's alleged failure to comply with Section 1902(a)(13)(D) of Title XIX (42 U.S.C. § 1396a(a)(13)(D). The repealed statute had required waiver of immunity for suits by providers "with respect to the application of subsection (a)(13)(D)."

since "states were immune from suits which would require payment of funds unless the state waived its immunity from such actions." The purpose of the repealing legislation was graphically described by Mr. Carter of Kentucky, a supporter of the bill, in the House debate (Cong. Rec., May 11, 1976, H. 4280):

> "The purpose of this legislation is to correct the mistake which was made on the last day of the session--December 19--when this whole problem was created.
>
> "At that time a bill was rushed to the floor, and this consent provision was added with neither House nor Senate committee consideration. Had the responsible committees been given the opportunity to examine this legislation and hold hearings, it would have become apparent that . .. that was not a good way to legislate.
>
> "It is neither responsible nor proper to wait until the end of the session--and then to consider legislation with such haste."

The three primary reasons for the retroactive repeal are clearly set out in the House Report at pp. 4-5: to prevent the "unreasonable burden of suits" from falling on states which did, under protest, comply with Section 111(a); to prevent the imposition of a "substantial penalty bear[ing] little relation to any substantive question relative to th[e] states' administration of the Medicaid program" on states which refused to comply; and because Congress had "serious questions . . . concerning the constitutionality of the provision."

To carry out the first purpose fully the legislation was given retroactive effect to January 1, 1976,*/ thus making it evident that full Eleventh Amendment immunity was restored as of that date to all states that had amended their Title XIX Plans in accordance with the prior law. HEW also recognized this effect of the repealing statute in its directive of October 28, 1976 to states which had filed waivers, directing them to remove the waivers from their plans effective as of January 1, 1976, a departure from general HEW practice of approving a Plan amendment effective as of the calendar quarter when submitted.**/

The Supreme Court has many times held that Congressional action withdrawing jurisdiction from a court applies not only to future, but to pending actions. As the Court

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*/ The Act containing the waiver provision was signed by the President on December 31, 1975.

**/ Plaintiffs allege that the repeal of Section 111 was intended solely to benefit those states which had ignored the federal statutory directive requiring consent-to-suit. This is clearly an untenable position since (a) the plain language of the repealing legislation makes no such distinction; (b) the legislative history of the repeal evidences the intent of Congress to protect all states from the adverse effects of such "ill-advised" legislation; and (c) failure to extend the benefits of the retroactive repeal to states such as New York would lead to the anomalous, highly unfair, and obviously unintended result that states which had obstinately refused to amend their State Plans in compliance with the previous Congressional mandate would be placed in a substantially better position than states which complied with Section 111.

stated in De La Rama Steamship Co., Inc. v. United States, 344 U.S. 386, 390:

> "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. Ex parte McCardle, 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are Hallowell v. Commons, 239 U.S. 506, and Bruner v. United States, 343 U.S. 112. If the aim is to destroy tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit."

In this case Congress included no saving exception for any case falling within the scope of Section 111. On the contrary, by repealing it and specifying that the repeal would be retroactive to the date it first took effect, Congress made clear that the waiver of consent provision should be given no effect whatsoever. */

In repealing Section 111, Congress was fully aware that it was withdrawing from providers of in-patient services a judicial forum in the federal courts which the provision had been designed to provide. However, as was made clear in the Report of the House Committee on Interstate and Foreign Commerce, supra, Congress felt that there was in existence a

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*/ In this case, the record leaves no doubt that New York's waiver was solely in response to the statutory directive and made under protest. Plaintiffs so alleged (Second Amended Complaint, ¶ 27), and the lower court so found in its Oral Opinion of July 29, 1976 at p. 13.

more appropriate remedy for testing state compliance with federal Medicaid standards. In the Medicaid title of the Social Security Act, Congress has prescribed the procedure for administrative adjudication of alleged violations of federal requirements, and sanctions for noncompliance. 45 U.S.C. § 1396(c). Furthermore, HEW regulations entitle all interested persons to participate fully in such "compliance" proceedings. 45 C.F.R. §§ 201.6, 213. Thus, as the Committee Report points out:

> "HEW has responsibility to assure that States operate in compliance with the requirements of the Federal law. If the tools available to it currently are not sufficient to accomplish this, the Committee expects the Department of Health, Education, and Welfare to request the changes in law that are needed. Nonetheless, the Committee is convinced that the urgent nature of the problems occasioned by the provisions of sec. 111 of Public Law 94-182 require immediate action to remove it from the law." Id. at 5.

B. There has Been No "Judicial Waiver" of the State's Eleventh Amendment Immunity In This Action.

Plaintiffs, in their Memorandum of Law in Opposition to the Application for a Stay, filed with this Court on December 9, 1976, have argued that there has been a "judicial waiver" of the State's Eleventh Amendment immunity in this action. Plaintiffs base this allegation on: (1) a statement made by an Assistant Attorney General in a conference before the District Court on July 28, 1976; and (2) the State defendants' agreement

to pay interest on any monies ultimately determined to be due retroactively. This argument ignores the two-fold test established by the Supreme Court in Ford Motor Company v. Department of the Treasury, 323 U.S. 459 (1945), to determine whether an administrative or executive officer of a state has waived the state's Eleventh Amendment immunity. First, it must be established that under state law, the official has the power and is properly authorized to waive the state's immunity. If the issue has not been determined by the state's courts, "th[e] Court must resort to the general policy of the state as expressed in its Constitution, statutes and decisions." Id. at 467. Second, the court must find that the state official has in fact waived the state's immunity in the proceeding in question. In the instant case, neither test is met.

It has long been settled by the courts of the State of New York "that the Attorney General may not waive the state's immunity from any action." In re Woitasek, 179 Misc. 947, 958 40 N.Y.S.2d 514, 515 (Sup. Ct. N.Y. Cty 1943). See also Seitz v. Messerschmitt, 117 App. Div. 401, 102 N.Y.S. 732, aff'd, 188 N.Y. 587, 81 N.E. 1175 (1907). In addition, several lower federal courts have held that a state attorney general cannot waive state immunity from suit. Desert Water, Oil & Irr. Co. v. California, 202 F. 498 (9th Cir. 1913); Title Guaranty & Surety Co. v. Guernsey, 205 F. 91 (W.D. Wash. 1913); O'Connor v. Slaker, 22 F.2d 147; (8th Cir. 1927), appeal dismissed,

278 U.S. 188; Dunnuck v. Kansas State Highway Comm'n, 21 F. Supp. 882 (D.C. Kans. 1937).

Furthermore, several provisions of the New York State Constitution clearly indicate a policy prohibiting state consent to suit in one particular case in the absence of a general legislative authorization of suit in all similar cases. Article III, § 19, provides that "[t]he legislature shall neither audit nor allow any private claim or account against the state . . ." except in accordance with state law. Article VI, § 9, gives the state court of claims jurisdiction to hear and determine claims against the state only "as the legislature may provide." Article VI, § 18, gives the legislature the power to "provide for the manner of trial of actions and proceedings involving claims against the state." As the Supreme Court stated in Ford Motor Company, supra, in construing a similar provision of the Indiana Constitution:

> "Since the state legislature may waive state immunity only by general law, it is not to be presumed in the absence of clear language to the contrary, that they conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases." Id. at 468.

The New York State legislature has never, explicitly or implicitly, granted such authority to State Attorneys General.

Even if an Assistant New York Attorney General had the authority under state law to waive the State's Eleventh Amendment immunity, it is clear that no such waiver has been

made in this action. The Supreme Court has established that a state's waiver of its constitutional protection under the Eleventh Amendment must be stated "by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction." Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909), cited in Edelman v. Jordan, 415 U.S. 651, 673 (1974). No such "express language" or "overwhelming implication" can be found in either circumstance cited by plaintiffs as an alleged "waiver." One was merely an agreement by the attorney for the State defendants that should any monies be deemed to be owed retroactively to plaintiffs, the State would pay interest on such monies during any stay of the District Court's order. The other merely consisted of the following exchange between Mr. Fine, Assistant Attorney General for the State of New York, and Judge Lasker, in a conference on July 29, 1976:

> "Can I have a representation, or do I have a representation from the state that if the court finds that the state procedures are invalid and if the state is nevertheless not enjoined but later on is found to owe money to the hospitals, that it will not raise the Eleventh Amendment as a defense to any suit by the hospitals to secure that money?"
>
> "MR. FINE: I think I can make that statement, your Honor."

In Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921, rehearing denied, 411 U.S. 988

(1973), a similar "representation" made in an affidavit submitted to a three-judge court in opposition to a preliminary injunction requiring retroactive payments was held to fall far below the standard required for an Eleventh Amendment waiver. The statement made in that case was that ". . . maintenance of welfare payments at present levels will result in no irreparable harm to plaintiffs since any sums ultimately found to be owing them could be disbursed at that time." As this Court correctly stated, such a statement:

> ". . . hardly represents an authoritative formulation and declaration of state policy. More significantly, however, it is subject to varying interpretations which prevent it from being the kind of clear and purposeful waiver which the Supreme Court has required in this context." Id. at 239.

Similarly, in the case of Mr. Fine's statement, an interpretation other than waiver of sovereign immunity is not only possible, it is the only plausible explanation. It is clear from Judge Lasker's Oral Opinion of July 29, 1976, that he had neither asked for, nor interpreted Mr. Fine's remark as a complete waiver of the State's sovereign immunity. The exchange concerned the State's sovereign immunity only for the period from the date the District Court could have entered (and in fact did enter) an injunction against the State's

enforcement of regulations without HEW approval.*/ Under the decision of the Supreme Court in Edelman v. Jordan, 415 U.S. 651 (1974), a federal court cannot grant monetary relief against a state for conduct undertaken "when [the state] was under no court-imposed obligation to conform to a different standard" unless the state has waived its Eleventh Amendment immunity. Id. at 668. Thus the District Court had the choice of either taking formal action to place the State defendants under such a "court-imposed obligation," or trying to secure an informal agreement that the state would not invoke its Eleventh Amendment defense for the future if it were not placed under formal restraint. The discussion had no bearing on past periods.**/

Similarly, the State's agreement, after the adverse ruling by the District Court on the jurisdictional issue, but pending appeal of that issue to this Court, to pay interest on

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*/ The injunction and related retroactive payment order are effective only until the date HEW approved the challenged regulations, which occurred less than three weeks after the exchange between Judge Lasker and the Assistant Attorney General. HEW approved the two more significant changes to the State Plan on August 16, 1976. A third amendment to the State Plan, 10 N.Y.C.R.R. § 82.26, was approved by HEW on October 4, 1976.

**/ At the time of the cited exchange, the State was vigorously contending that the "waiver" compelled by the then-extant Section 111(a) of Public Law 94-182 was not constitutional. Judge Lasker ruled against the State on that point, but not until the next day. It is inconceivable that Judge Lasker would have asked the State to waive its immunity before his ruling on the jurisdictional issue, and equally inconceivable that the Assistant Attorney General would have made such a waiver.

any amount which might ultimately be deemed to be owing to plaintiffs, was clearly not a waiver of its Eleventh Amendment immunity. Certainly Judge Lasker, in imposing that condition on the State, was not asking the State to abandon the very issue on appeal pending that appeal, nor is it conceivable that the State could have done so.

C. The Retrospective Relief Sought By Plaintiffs And Granted By the District Court Is Barred By the Eleventh Amendment.

The Supreme Court's decision in Edelman v. Jordan, supra, has made it clear that where a state has not waived its constitutional right to immunity, a federal court has no jurisdiction to grant the retrospective relief sought by plaintiffs in this action and granted by the District Court in the judgment of that Court entered August 2, 1976. The Eleventh Amendment provides that:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

While the Amendment does not by its terms bar suits against a state by its own citizens, the Supreme Court has consistently held that an unconsenting state is immune from suits brought in federal courts by its own citizens. Hans v. Louisiana, 134 U.S. 1 (1890); Edelman v. Jordan, supra, at 663, and cases cited therein.

Even though the state is not a named defendant in this action, suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Edelman v. Jordan, supra. There is no doubt that in the instant case the payment of recomputed reimbursement rates for in-patient Medicaid services rendered after January 1, 1976, as ordered by the District Court on August 2, 1976, would involve substantial expenditures from the public funds of the State of New York.

The fact that this action is styled a[illegible]e for equitable relief rather than money damages does not avoid the Eleventh Amendment bar against suit. In Edelman v. Jordan, supra, the Supreme Court rejected a similar request for retroactive "equitable relief" by recipients of funds under the Aid to the Aged, Blind and Disabled program against Illinois State officials who allegedly had implemented state regulations inconsistent with relevant federal statute and regulations, and violative of the equal protection provisions of the Fourteenth Amendment. The Court held that ordering the State Commissioner to use state funds in reparation for past state implementation of the program clearly violated the basic constitutional protection provided by the Eleventh Amendment, stating:

> "[The District Court's decree] requires payment of state funds . . . as a form of compensation to those whose applications were processed . . . at a time when petitioner was under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State." Id. at 668.

The relief sought by plaintiffs and granted by the District Court's Order of August 2, 1976 clearly violates the Eleventh Amendment as construed in Edelman. The State of New York was not told to comply with federal standards in the future, but rather that it had not done so for the period from January 1, 1976, to the date of HEW approval of the regulations in question, which was August 16, 1976, and that in consequence it must expend state funds to pay recomputed benefits for that period. Such a monetary penalty resulting from conduct of state officials prior to any judicial determination of its validity is beyond the jurisdiction of a federal court to impose, and cannot be sustained. */

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*/ Plaintiffs sought to pr[illegible]ate jurisdiction not only on the nonrepealed "waiver" st[illegible]e, but also on 28 U.S.C. § 1331 and 5 U.S.C. § 702. Edelman [illegible] Jordan, supra, completely disposes of the claims under Section 1331. As for Section 702, the judicial review section of the Administrative Procedure Act, at best it merely permits a suit against the federal defendants, but provides no basis for an unconsented suit against the State defendants.

II. THE RELIEF AFFORDED BY THE DISTRICT COURT REPRESENTS AN IMPROVIDENT EXERCISE OF GENERAL EQUITY JURISDICTION OF THE FEDERAL COURTS.

Even if federal court jurisdiction to order retroactive payments were not foreclosed by the Eleventh Amendment, the Orders of the District Court should be vacated because the Court exceeded the bounds of general federal court equity jurisdiction in compelling payments for past periods.

The controlling authorities in this Circuit are this Court's decision in Rothstein v. Wyman, 467 F.2d 226 (1972), and the Supreme Court's decision in Rosado v. Wyman, 397 U.S. 397 U.S. 397 (1970), and the subsequent history of that case recounted in the Rothstein opinion.

Like this case, Rothstein dealt with payments made by New York pursuant to the Social Security Act -- in that case, payments to welfare recipients under Title IV of the Act, the AFDC program. The latter program, like Medicaid (Title XIX), is jointly funded by the federal and state governments and is administered by them in a "scheme of cooperative federalism." Jefferson v. Hackney, 406 U.S. 535 (1972), quoting King v. Smith, 392 U.S. 309, 316 (1968). The narrow issue in Rothstein was precisely the same as presented here, i.e., whether federal courts could order states to make retroactive payments under programs developed pursuant to the Social Security Act for a period during which

payment levels were claimed to be out of compliance with federal requirements.*/

In Rothstein it was determined that AFDC payment levels for past periods violated federal requirements, and the District Court had ordered the state to recompute welfare payments and to reimburse recipients for the difference between payments that were made to welfare recipients and the level of payments required by federal law.**/

The Second Circuit reversed not only on the Eleventh Amendment ground but also on the independent ground, which it treated first, that the District Court had overstepped federal court equity jurisdiction in ordering retroactive payments pursuant to the Social Security Act. The Court rested that conclusion on two principal bases, both of which are controlling here.

First, it concluded that relief afforded by the District Court was foreclosed by the Supreme Court decision

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*/ One difference in the cases is that the plaintiffs in Rothstein were the intended beneficiaries of the federal statute on which the suit was predicated. That is not true here.

**/ The District Court had ordered that relief on the theory that, absent an obligation to make retroactive payments, the state would be immunized from illegal conduct, would be encouraged to violate constitutional and statutory strictures, the plaintiffs were legally entitled to the unpaid assistance and "because to hold otherwise would be to sanction defendants' lawless conduct."

in Rosado v. Wyman, supra. In that case the Supreme Court held that New York's welfare payment levels violated the Social Security Act but declined to order any retroactive relief, and instead remanded the case to the District Court "to fix a date that will afford New York an opportunity to revise its program in accordance with the requirements of section 402 if the state wishes to do so" (at 421). On remand, the plaintiffs sought an order to compel retroactive payments, which relief the District Court denied on the ground that such relief was contrary to the federalism scheme charted in the Social Security Act and to the earlier decision of the Supreme Court in that case.*/

The second basis for this Court's reversal of the retroactive payment order in Rothstein was its determination that court-ordered retroactive payments would transgress federal principles which lay at the heart of the Social Security Act partnership machinery:

> "Congress was clearly sensitive to the potential for serious strain in the federal structure inherent in a grant program of great magnitude and complexity. . . . The states were not to be deprived of their freedom to determine ultimately whether, and how, state funds are to be spent. Absent explicit directions from Congress to the contrary, we do not think that the federal interest in retroactively

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*/ This later disposition of the District Court was not challenged on appeal by the plaintiffs.

> correcting the misuse of federal funds -- the only federal policy applicable to this case -- can by itself justify the significant increase in federal-state tensions which would result from a court order requiring the state to expend its funds against its will. We thus conclude that the public interest considerations which cause the state to oppose retroactive payments under the circumstances of this case are to be given special weight, and that a federal court should be very slow indeed to command a result which the state believes not to be the best use of state funds in meeting the current needs of its citizens." (At 235.)

This point applies with the same force here. The Medicaid and AFDC programs, both established by the Social Security Act, are funded and administered by the federal government and the states in precisely the same kind of cooperative federalism scheme; and the "increase in federal-state tensions" which would result from a federal court order requiring the state to expend its funds "against its will" is exactly the same in this case as in Rothstein.

The only material difference between Rothstein and this case is that the factors referred to in the Rothstein opinion that might support an exercise of federal court jurisdiction to require retroactive payments are far more attenuated here than in Rothstein. Thus, the court in Rothstein identified three congressional interests that retroactive payments "might be thought to further" -- but which were deemed insufficient to support an assertion of federal court jurisdiction (at 234):

First, the court referred to the possibility that retroactive payments would help deter "bad faith" and "wilful state violations of federal requirements" (at 235). The court was unable to find that the state "consistently follows a course of unlawful conduct which requires that it be dramatically confronted by the minatory face of the federal courts" (id.). Similarly in this case there has been no showing of any bad faith or any consistent and egregious unlawful conduct on the part of the State. Instead, the facts are that the State, faced with a fiscal crisis and soaring State payments under the Medicaid program, reasonably elected to re-evaluate its prospective reimbursement formula. After detailed study, it promulgated a reimbursement formula found by HEW to be wholly consistent with federal requirements. (McCann Affidavit.) Thereafter, the State undertook to compensate the hospitals for the entire year on the basis of the reimbursement methodology as approved by HEW. This is far from the kind of "bad faith" or "consistent unlawful conduct" to which the court referred in Rothstein.

Second, the court in Rothstein referred to the "fundamental" federal policy in favor of satisfying "the ascertained needs of impoverished persons" (at 235). That factor is not present in this case since there has been, and can be, no claim that necessary services have been withheld during the retroactive period. Moreover, whatever may

be the interest of the hospitals in generous reimbursement under the Medicaid program, the funding of the hospitals is far from "the fundamental goal of congressional welfare legislation" (id.) that the court in Rothstein noted of the AFDC program.*/

Third, the court in Rothstein adverted to the interest of the federal government "as grantor in the proper use of granted funds" (id.). The court in Rothstein then pointed out that "Congress has given no indication that it deems retroactive payments necessary to protect its interest, since the only remedy it expressly contemplated was a prospective cut-off of funds"; and it concluded that retroactive payments should not be ordered "absent explicit directions from Congress to the contrary" (id.). On this score, the Medicaid title of the Social Security Act works in just the same way as the AFDC title of the Act; applicable provisions are virtually in haec verba. Compare 45 U.S.C. § 604 with

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*/ For another reason, this factor does not apply to the hospitals in this case. Here the State has been prepared, since July 1, 1976, to make payments to the hospitals in accordance with the methodology which HEW has now approved and determined to be in accordance with federal standards. Therefore, even if the Social Security Act were designed to advance the interests of hospitals -- as well as the State's disadvantaged citizens -- the State's current rate methodology satisfies those interests in a fair and equitable manner.

§ 1396c. And see 45 C.F.R. § 201.6. In both titles Congress has prescribed a procedure for administrative adjudication of alleged violations of federal requirements and has further prescribed a sanction for noncompliance in the form of withholding of federal funds from noncomplying states. By HEW regulations, all interested persons are entitled fully to participate in the so-called "compliance" proceedings, and court review is expressly authorized. 45 C.F.R. §§ 201.6, 213, 42 U.S.C. § 1316. Thus, under the Medicaid program as well as the AFDC program, there exist no "explicit directions from Congress" that court-ordered retroactive payments were contemplated by the Act; instead, the statute expressly and exclusively contemplates initiation of proceedings within the Department and prospective, rather than retroactive, remedies.*/ There is a second point on this topic. The federal interest in "the proper use of granted funds" (at 235) has not been flouted here. For the state has made payments to the hospitals from January 1, 1976, to the present on the basis of methodology approved by the governmental agency charged with the responsibility for passing on payments to providers.**/

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*/ The legislative history of the repeal of the right-to-suit provision in the Medicaid statute, referred to above, confirms that the procedure contemplated by the Social Security Act for noncompliance by states with federal requirments under the Medicaid program is for the Department "to hold a conformity hearing on the matter and on a finding of noncompliance to cut off all federal Medicaid funds." H.R. Rep. No. 94-1122, 94th Cong., 2d Sess. 3 (May 11, 1976).

**/ Plaintiffs contend that this methodology should have been approved by HEW prior to implementation. But that contention relates solely to timing of approval. What cannot be contested is that the State has paid on a basis approved by HEW rather than on some basis found to be "improper" by the Department.

It follows a fortiori from the Rothstein case that the court-ordered retroactive payment obligation must be vacated. The principles found paramount by the court in Rothstein in refusing to order retroactive payments apply with full force here. And, on the other side, the factors adverted to in Rothstein which might provide some support for court-ordered retroactive payments are of minimal, virtually no, force in this case.

CONCLUSION

For the foregoing reasons the Orders of the District Judge requiring payments to plaintiffs for past periods should be reversed and vacated.

Respectfully submitted,

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December 30, 1976

ADDENDUM

The following are material portions of the Federal and New York State Constitutions, statutes and regulations which are relevant to the determination of the issues presented by this case.

1. The Eleventh Amendment of the United States Constitution:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

2. Public Law 94-182, § 111, 89 Stat. 1054, December 31, 1975, amending 42 U.S.C. § 1396(a):

> Sec. 111.(a) Section 1902 of the Social Security Act is amended by adding at the end thereof the following new subsection:
>
> "(g) Notwithstanding any other provision of this title, a State plan for medical assistance must include a consent by the State to the exercise of the judicial power of the United States in any suit brought against the State or a State officer by or on behalf of any provider of services (as defined in section 1861(u)) with respect to the application of subsection (a)(13)(D) to services furnished under such plan after June 30, 1975, and a waiver by the State of any immunity from such a suit conferred by the 11th amendment to the Constitution or otherwise."

(b) Section 1903 of such Act is amended by adding at the end thereof the following new subsection:

"(l) Notwithstanding any other provision of this section, the amount payable to any State under this section with respect to any quarter beginning after December 31, 1975, shall be reduced by 10 per centum of the amount determined with respect to such quarter under the preceding provisions of this section if such State is found by the Secretary not to be in compliance with section 1902(g)."

(c) The amendments made by this section shall (except as otherwise provided therein) become effective January 1, 1976.

3. Public Law 94-552, 90 Stat. 2540, October 18, 1976:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (g) of section 1902 of the Social Security Act and subsection (1) of section 1903 of such Act are repealed.

Sec. 2. The amendments made by the first section shall take effect as of January 1, 1976.

4. The compliance provision of Title XIX of the Social Security Act, 42 U.S.C. § 1396(c):

§ 1396c. Operation of State plans

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds--

(1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

COVINGTON & BURLING

Re: Case No. 76-6117 in the
United States Court of Appeals
for the Second Circuit

HOSPITAL ASSOCIATION OF NEW YORK STATE, INC., et al.,

Plaintiffs-Appellees,

v.

PHILIP L. TOIA, et al.,

Defendants-Appellants,

and

DAVID MATHEWS, as Secretary of the U.S. Department of Health, Education & Welfare,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK have been served by hand this 30th day of December, 1976, upon each of the following:

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